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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT JEFFERY STEWART, Defendant and Appellant.	F057704 (Super. Ct. No. F07902018) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Denise L. Whitehead, Judge.

Law Office of Mark W. King and Mark W. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette and Michael P. Farrell, Assistant Attorneys General, and Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Levy, A.P.J., Cornell, J., and Hill, J.

Pursuant to a plea agreement, appellant Robert Jeffrey Stewart pled no contest to the charge of committing a felony violation of Penal Code[1] section 496, subdivision (a) (receiving stolen property). The court placed appellant on two years' probation. Thereafter, appellant filed a notice of motion for the return of certain items of property, including a .22-caliber rifle and a .22-caliber handgun. Following a hearing, the court denied the motion.

Appellant's sole contention on appeal is that the court erred in denying his motion for return of the two .22-caliber firearms. We will dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The report of the probation officer indicates the following: On November 6, 2006, California Department of Fish and Game (DFG) officers conducted an inspection of appellant's taxidermy business, which appellant operates out of a shop attached to his residence. Inside the shop, officers found a stolen assault rifle, a mountain lion skull, a woodpecker carcass, and some "untagged" deer antlers. Inside appellant's truck, parked outside, officers found a loaded .22-caliber rifle, a "silencer" that fit the rifle, and a loaded .22-caliber handgun.

Appellant entered his plea on June 26, 2008. One of the terms of his plea agreement, as stated in the "Felony Advisement, Waiver of Rights, and Plea Form" executed by appellant that day, was that there would be "no state opposition" to appellant's motion to reduce the instant offense to a misdemeanor "upon successful completion of probation." (Unnecessary capitalization omitted.)

The court placed appellant on probation on July 25, 2008.

On December 23, 2008, appellant filed a notice of motion for the return of certain items, including the two .22-caliber firearms. His supporting papers, filed at the same

[1] All statutory references are to the Penal Code.

time, included a "Power of Attorney for Firearms Relinquishment, Sale or Disposal-Declaration," executed on October 16, 2008, in which he averred, in relevant part, as follows: "I ... designate MARK W. KING [appellant's his trial counsel] to have Power of Attorney for the purpose of transferring or disposing of my firearm(s). This Power of Attorney designation is only effective for 30 days from the date of this designation. This designation shall become null and void after 30 days.... I ... understand that during my probation period, I cannot possess or have access to my firearms, or any other firearms."

At the hearing on the motion on March 19, 2009, the court ruled: "With respect to the .22-caliber firearms, ammunition and accessories, Mr. Stewart cannot legally possess the firearms as a convicted felon. The notarized power of attorney transferring possession to his attorney for the remainder of his probationary period has several problems. First, ... even once he is off probation, ... he's going to be a convicted felon, so he can't possess those. He could, of course, transfer those to his attorney for disposal, but the problem with that is the fact that the transfer and relinquishment of a firearm to his attorney is effective for only 30 days from the date of designation, [i.e.,] October 16, 2008, that designation is no longer effective, so that request to return the firearms is denied."

DISCUSSION

As indicated above, appellant argues that the court erred in denying his motion for the return of the two .22 caliber firearms.[2] The People counter that that the order appealed from is not an appealable order. The People are correct.

Preliminarily, we note that although appellant based his motion on section 1417.5, that statute provides a procedure for an owner of property to obtain the return of such

[2] Appellant does not challenge the court's order with respect to other items seized by DFG officers.

property that has been received as an exhibit, or "filed," in a criminal case, and here the firearms in question were neither used as an exhibit nor filed with the court. (§ 1417.5, 1sr par.) Therefore, section 1417.5 is inapplicable.

However, "Persons may not be deprived of property without due process of law, nor may the Legislature expropriate private property by mere legislative enactment. [Citations.] 'The right to regain possession of one's property is a substantial right which may not be dependent upon the whim and caprice of a court....' (*Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884, 896, citations omitted (*Franklin*).) Continued official retention of legal property with no further criminal action pending violates the owner's due process rights." (*People v. Lamonte* (1997) 53 Cal.App.4th 544, 549.) And ,"[i]t has been held that for purposes of lawful disposition of property, there is no reason to distinguish between seized property used as exhibits and seized property which was not used, since both were seized by a public officer, acting under color of his status as a law enforcement officer, and seized solely on the theory that it constitutes a part of the evidence on which judicial action against its owner or possessor will be taken." (*People v. Hopkins* (2009) 171 Cal.App.4th 305, 308, fn. 1 (*Hopkins*).) Accordingly, "A [criminal] defendant may also bring a nonstatutory motion for return of property seized by warrant or incident to arrest which was not introduced into evidence but remained in possession of the seizing officer." (*People v. Lamonte*, *supra*, 53 Cal.App.4th at p. 549.) Here, notwithstanding appellant's references below and on appeal to section 1417.5, we treat the instant motion as nonstatutory one for the return of property. We turn now to the question of the appealability of the denial of such a motion.

"'It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.'" (*People v. Mazurette* (2001) 24 Cal.4th 789, 792.) "Stated simply, a criminal appeal by the defendant may be taken only from 'a final judgment of conviction' (§§ 1237, subd. (a), 1466, subd. (2)(A)) or from 'any order

made after judgment, affecting the substantial rights' of the party (§§ 1237, subd. (b), 1466, subd. (2)(B))." (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 980.) Appellant argues that the court's order denying his motion for the return of the two .22 caliber firearms seized by DFG officers was a post-judgment motion "affecting [his] substantial rights" within the meaning of section 1237, subdivision (b) (section 1237(b)), and therefore appealable.[3] He relies chiefly on *Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884 (*Franklin*) which, as indicated above, characterizes "the right to regain possession of one's property" as "a *substantial right* which may not be dependent upon the whim and caprice of a court ...." (*Id.* at 896, italics added.)

Franklin, however, is inapposite because the court there did not interpret the phrase "order made after judgment, affecting ... substantial rights" in section 1237(b). And it is that phrase *as used in that statute* that concerns us here. "If interpreted broadly, the phrase would apply to any postjudgment attack upon the conviction or sentence.... However, decisional authority has limited the scope of the phrase, defining appealability more narrowly." (*People v. Gallardo*, *supra*, 77 Cal.App.4th at p. 980.)

As our Supreme Court stated in a case involving a criminal defendant's claim for the recovery of property unlawfully seized: "[T]he proceeding for such recovery is independent of the criminal proceeding in which it is sought to use such articles as evidence.... [U]pon what theory can it be held that such proceeding is an incident of the trial, in such a sense that the ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case.... [¶] Only matters incident to the cause of action on trial are subject to review on appeal therefrom ...."

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[3] Section 1237(b) provides that a criminal defendant may appeal "From any order made after judgment, affecting the substantial rights of the party."

(*People v. Mayen* (1922) 188 Cal.237, 251-252, overruled on other grounds in *People v. Cahan* (1955) 44 Cal.2d 434, 445.) Thus, it is well-established that "a motion for return of property is a separate procedure from the criminal trial and is not reviewable on an appeal from an ultimate judgment of conviction." (*People v. Gershenhorn* (1964) 225 Cal.App.2d 122, 125; accord, *Hopkins*, *supra*, 171 Cal.App.4th 305, 308 [nonstatutory motion for return of medical marijuana]; *People v. $25,000 United States Currency* (2005) 131 Cal.App.4th 127 131-132 [claim for return of property seized for civil forfeiture]; *People v. Tuttle* (1966) 242 Cal.App.2d 883, 885 [statutory motion for return of property admitted into evidence at trial].) Accordingly, the instant appeal must be dismissed.[4]

DISPOSITION

The appeal is dismissed.

[4] As in *Hopkins*, where the defendant sought, by means of a nonstatutory motion, the return of marijuana he claimed he legally possessed for medical purposes, "The proper avenue of redress was through a petition for writ of mandate, not an appeal. [Citations.] Alternatively, the individual may seek return of his or her property in a civil action for recovery of property with an attendant right to appeal from any adverse civil judgment. [Citations.]" (*Hopkins*, *supra*, 171 Cal.App.4th at pp. 308-309.)